SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-818

EDWARD R. BIGGER, WALTER BLACKMON, KENNETH DOOLEY, LUCILLE NORD, SHIRLEY GOFF, PAUL BROCK, JOSHUA HEBINGTON, ORVILLE THOMPSON, WILLIAM TEAGUE, MARGARET OSBORNE, CAROL L. CARRIE, and others too numerous to bring before the Court,
Petitioners,

v.

CITY OF PONTIAC and CITY OF PONTIAC STADIUM BUILDING AUTHORITY
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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WO. 2-8745—WO. 2-8732

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PETITION FOR WRIT OF CERTIORARI

Edward R. Bigger, Kenneth Dooley, Lucille Nord, Shirley Goff, Paul Brock, Orville Thompson, William Teague, Margaret Osborne, Carol L. Carrie, and others too numer-

ous to bring before the Court, Petitioners, pray that a Writ of Certiorari be issued to review the judgment of the Michigan Supreme Court refusing to rule on the issues and merits of the case, and affirming the Circuit Court for the County of Oakland, and dismissing the Complaint on grounds of inability to decide the merits within the time allowed.

CITATIONS TO OPINIONS BELOW

The opinion of the Michigan Supreme Court appears in 210 NW 2d I (App. 16). The decision of the Oakland County Circuit Court is printed in part in the appendix at page 21.

JURISDICTION

The order of the Michigan Supreme Court was entered on August 24, 1973; the opinion of the court incorporating said order was filed and entered on September 5, 1973. The jurisdiction of this court is invoked under Title 28, Section 1257(3) of the United States Code.

QUESTIONS PRESENTED

I. Were Petitioners deprived of due process of law guaranteed them by the Fifth and Fourteenth Amendments to the Constitution of the United States by the trial court's refusal to hear the merits of Petitioners' cause and by the State Supreme Court's refusal to review the trial court's decision on the grounds of insufficient time based upon Respondents' self-imposed timetable, where Respondents had

invited Petitioners to delay until the very date of institution of suit?

II. Were Petitioners deprived of due process of Law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States by the change of purpose and scope of project after a popular vote on a super-stadium project where local law required a full disclosure of the purpose and scope on election ballots?

III. Did the Michigan Supreme Court error in refusing to rule on the misuse of Federal Revenue sharing funds alleged by Petitioners, where the funds were being applied to interest on bonds issued for capital improvements contrary to Public Law 92-512?

STATEMENT OF FACTS

On February 22, 1973, several of Petitioners filed suit in Circuit Court against Respondents, complaining of the advertising of jobs for the unemployed in a new football super-stadium as an incentive to vote for Sixteen Million Dollars of taxpayer obligation bonds to finance the Pontiac, Michigan super-stadium. On March 12, 1973, the court dismissed the complaint, holding that such advertising was proper. The Plaintiffs in that suit did not appeal.

However, during that action, on February 26, 1973, the Respondents opposed Petitioners' request for an Injunction with the following:

> "Since, as is set forth above, the City of Pontiac will not be in a position to either issue or sell the stadium bonds for several months, this request for preliminary injunctive relief is not only premature,

but is based on plaintiffs' apprehension of injury or damage which will occur only in the future."

The stadium project required action by the Michigan legislature and approval by the Governor before the sale of bonds. It further required approval of a statutory administrative body, the Michigan Municipal Finance Commission, all of which occurred by June 19, 1973. The sale of bonds mentioned in Respondents' advice to Petitioners occurred on July 17, 1973. Respondents instituted an original action in the Michigan Supreme Court on July 18, 1973, depending on the following in a recent Michigan stadium case, *Alan v. County of Wayne*, 388 Mich. 210.

> "The equitable doors of the Supreme Court are wide open for direct actions by taxpayers for injunctive protection against more levies 'without limitation as to rate or amount' whenever they are able to plead and prove a case of confiscation or irreparable injury."

The complaint was dismissed for lack of jurisdiction on July 31, 1973.

The next day, August 1, 1973, the second complaint was refiled in Circuit Court and a hearing on a Motion for Summary Judgment on shortened notice was heard on August 6, 1973. The motion was based principally on laches attributed to Petitioners. Petitioners contested on the basis of fact issues to be tried and averred justifiable reliance on Respondents' invitation to delay, together with the contingencies of the project.

The second complaint related to Respondents' actions after the dismissal of the first complaint including the elimination from existing stadium building contracts of a roof over the stadium on March 19, 1973. Respondents contend

that the roof can be added at any time, while Petitioners say the electorate should have another chance to vote since the nature and purpose of the ballot proposition were altered substantially, i.e., super-stadium to open ballpark.

By State Code, C.L. '48 § 141.133, MCLA 141.133, a thirty-day period for petitioning for a referendum on revenue bonds is availed to the people and Petitioners complained that this period expired before the announcement of the change in the project, and after their first complaint was dismissed. Respondents admit the changes and the trial court so found (Appendix, 22, Judge Moore's Opinion). Petitioners further contended that Respondents knew of the anticipated alteration of the Pontiac Lions football stadium before the election of December 11, 1972, and had informed the Lions football team owner, William Clay Ford, thus alleging actual fraud on the electorate and not merely a constructive fraud.

Following dismissal of the second complaint on August 8, 1973, Respondents appealed directly to the Michigan Supreme Court, bypassing the Court of Appeals, although Respondents had fully prevailed on all non-spurious issues.* The Michigan Court limited Petitioners to three specific questions but asked for all the merits of the cause of Petitioners.

Petitioners included the issue of whether the Respondents were using Federal Revenue sharing funds contrary to Public Law 92-512 and the rulings of the Secretary of

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* The editors of West Publishing Company were also perplexed by this first in legal history when they listed Petitioners as Plaintiffs-Appellees at the beginning of the report of 210 NW 2d 1, but in the editorial summary following the case title, said "on appeal by the Plaintiffs" five lines from the bottom of the first page. Clearly they were confused by this non-appeal affirmance.

Treasury of the United States. This issue was ignored by the trial court, although it was mentioned on the record and the Michigan Supreme Court also side-stepped the issue, since the court refused to rule on the merits of the case.

Respondents and their supporters showed their intention to use Federal Revenue sharing funds to defray interest on the revenue bonds prior to the production of any revenue in the following advertisement in local papers:

> "*ALL THIS. . . WITHOUT ADDED TAXES* thanks to Federal Revenue sharing, and the commitment by the City Commission to provide for the city to pay the citizens' share of the bond interest should a favorable vote be cast for the new stadium or recreational facility, the Pontiac taxpayers will enjoy this new facility without any added tax burden."; Oakland Press; Dec. 11, 1972, Pontiac Times, Dec., 1972.

ARGUMENT

I.

PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW GUARANTEED THEM BY THE FIFTH AND FOURTEENTH AMENDMENTS BY THE STATE COURTS' REFUSAL TO HEAR THE MERITS OF A CASE INVOLVING MUNICIPAL GOVERMENTS OF THE STATE ON THE GROUNDS OF INSUFFICIENT TIME WHEN THE STATE MUNICIPALITIES HAD INVITED AND ENCOURAGED THE DELAY.

A State agency or municipality cannot cause citizens to rely on a statement that the citizens are premature in seeking an injunction before sale or issuance of bonds, and then complain of laches when the citizens do delay until the sale but before delivery of the bonds to ask for another injunction, *Fletcher v. Peck*, 10 U.S. 87 (18.10); *Dickerson v. Col. grove*, 100 U.S. 578 (1879); *Hackett v. Ottawa*, 99 U.S. 86 (1878).

The rule that one cannot take advantage of his own wrong (even if he happens to represent the state sovereign) is found in Michigan decisions as well, *Hack v. City of Detroit*, 34 NW 2d 66 (1948); *Livonia Township Schools v. Wilson*, 64 NW 2d 563 (1954); *Birch Forest Club v. Rose*, 179 NW 2d 39 (1970); *Alan v. County of Wayne*, 200 NW 2d 628, 698 (1972).

The actions by Respondent municipalities and the State Courts amount to significant "state action" under the Fourteenth Amendment, *Moose Lodge No 107 v. Ervis*, 92 S.Ct. 1965 (1972) and did deprive Petitioners of their right to a hearing on the merits of their cause, particularly where Petitioners alleged actual fraud, included an Affidavit in answer to the Motion for Summary Judgment showing that voters were misled by the fraud (App. p. 13) and of-

fered to prove that the election approving the taxpayer obligation bonds would have been reversed had the fraud been exposed. A trial even in a civil matter is part of the "ordered liberties" under the Fourteenth Amendment, although it is within a State Court's power to withhold trial or hearing on a matter if there are no issues to be decided. In this case, even the Michigan Supreme Court said, "Orderly presentation of the claims here asserted *would appear to require an evidentiary hearing*" (emphasis supplied). *Bigger et al. v. City of Pontiac,* 210 NW 2d 1, 3 (1973) (set out in Appendix).

The class of citizens which Petitioners represent in Pontiac, Michigan, have been deprived of property to the extent that they are obligated into the twenty-first century on Fifteen Million, Nine Hundred and Fifty Thousand ($15,950,000) Dollars together with interest for a period of thirty years.

II.

PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT WHEN MUNICIPAL CORPORATIONS OF THE STATE OF MICHIGAN CHANGED THE PURPOSE AND SCOPE OF A SUPER-STADIUM AFTER A POPULAR VOTE APPROVING CONSTRUCTION BONDS.

The Pontiac City Charter requires both the purpose of public improvement bonds and the "rate of interest thereon" to be set forth on ballots to be employed at an election of the bond proposal. The purpose on the ballot used in the election of December 11, 1972, disclosed "a stadium". Respondents admit and both Lower Courts found that pre-election advertising had sold a domed stadium in the popular fashion of the Astro-Dome in Texas. The illustrations in full page advertisements by the Respondents and the pictures in City Hall showed a domed or covered stadium.

However, on March 19, 1973, Respondents announced the stadium could not be constructed with a dome because of insufficient finances. The alternative, an increased price tag on the stadium, would have required a new election or at least afforded stadium opponents an opportunity to petition for the same. Petitioners contend that if the purpose or scope of a public project is limited, then fairness alone requires the affording of another chance for the electorate to change their minds.

An enclosed stadium such as the Dallas Astro-Dome offering the comforts of home can be readily distinguished from an open ball park exposed to the elements by any voter who has viewed his favorite football team under both circumstances. Even the Congress has noted the distinction in requiring T-V screening of professional football games in the event of a sold-out stadium.

A ballot proposition must therefore set forth its purpose and must not mislead, *Michigan Public Service Co., v. Cheboygen,* 324 Mich 309 (1949); *Schoerr v. Miller,* 206 NE 2d 902 (Ohio, 1965); *Pennington v. Sumner,* 270 NW 629, 119 A.L.R. 355, 359 (Iowa, 1936); *Arkansas-Missouri Power Co. v. City of Rector,* 217 SW 2d 335 (Ark., 1949); *McNichols v. City and County of Denver,* 209 P 2d 910 (Col., 1949); *Alan v. County of Wayne,* 200 NW 2d 628 (1972).

Moreover, a vote for or against a proposition cannot be set aside at the pleasure of the municipality, *George v. Wyandotte Electric Light Co.,* 105 Mich 1 (1895); *City Commission of Jackson v. Hirschman,* 253 Mich 596, 600 (1931); *Wightman v. Village of Tecumseh,* 157 Mich 326 (1909); Vide: 43 Am Jur (1st Ed.), Public Securities and Obligations, sec. 47, p. 306. Here, the voters had expressed their pleasure, any substantial changes such as would affect usage and appeal of a public project should require a new vote of the electorate.

III.

THE MICHIGAN COURTS ERRED IN REFUSING TO RULE ON THE MISUSE OF FEDERAL REVENUE SHARING FUNDS PUT IN ISSUE BY PETITIONERS.

Respondents admitted in print that as recently as December 12, 1973, they intended to use Federal Revenue Sharing Funds as "seed money" to pay interest on revenue bonds during the construction period of the stadium, Petitioners contend that this practice is contrary to the rulings of the Secretary to Treasury and the Act of Congress, P.L. 92-512; Federal Register, February 13, 1973; February 22, 1973; *Mathews v. Massell,* C.A. #17814, U.S. Dist. Ct., Northern District of Georgia, Atlanta Div., March 15, 1973.

Petitioners believe that this issue is within the jurisdiction of State Courts and could be heard on a remand of this cause for trial.

CONCLUSION

This Petition for Writ of Certiorari presents substantial Federal questions. These issues will never see the light of day if this, the Court of last resort, does not cause review of the fraud perpetrated on the electors of the City of Pontiac by a state's municipality and its Stadium Building Authority. Respondents admit and the Lower Courts have found the facts necessary to substantiate Petitioners' claims. The settled record clearly shows the necessity of a full and fair evidentiary hearing on the merits.

For the foregoing reasons, it is respectfully submitted the Petition for Certiorari be granted.

Respectfully submitted,

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(313) 933-4142

Dated: November 15, 1973

APPENDIX

AFFIDAVIT

State of Michigan,
County of Oakland—ss.

Clara Louinger, being first duly sworn, deposes and says:

I. That deponent voted December 11, 1972 in approval of the Fifteen Million, Nine Hundred Fifty Thousand ($15,-950,000.00) Dollar "stadium" bond issue, but did so relying on the fact that an enclosed and covered seating area and playing area, much like the "Astrodome" in Texas, was to be built and deponent would not have voted for said bond issue if deponent had known that an arena open to the elements like others in Michigan was to be constructed.

Further deponent sayeth not.

/s/ Clara Louinger

Subscribed and sworn to before me this 5th day of August, 1973.

/s/ Michele Marguerite Racette
Notary Public, Oakland County, Michigan
My commission expires May 3, 1977

EXCERPT FROM RESPONDENTS' OBJECTIONS TO INJUNCTION, DATED FEBRUARY 26, 1973

* * * * *

There is no showing in plaintiffs' Complaint—nor could there be—that any such irreparable damage would inure to them should the relief sought not be granted. Further, the mere apprehension of injury or damage at some remote future date cannot be the basis for issuance of a preliminary injunction under the Michigan Supreme Court's decision in *Fenestra, Inc. v. Gulf American Land Corp.*, 377 Mich. 565 (1966). Since, as is set forth above, the City of Pontiac will not be in a position to either issue or sell the stadium bonds for several months, this request for preliminary injunctive relief is not only premature, but is based on plaintiffs' apprehension of injury or damage which will occur only in the future. Such apprehension cannot, under the *Fenestra* rule, form the basis for entry of the injunctive relief requested.

SUPREME COURT ORDER AND OPINION

STATE OF MICHIGAN
SUPREME COURT

Edward R. Biggers, et al.,
Plaintiffs-Appellees,
v
City of Pontiac and City of Pontiac Stadium Building Authority,
Defendants-Appellants.

Before the Entire Bench (except Brennan and Williams, JJ.)

Per Curiam

On August 24, 1973, the following order was entered by this Court:

"On order of the Court, application by defendants and appellants for leave to appeal prior to decision by the Court of Appeals and plaintiffs-appellees' brief responding to the specified questions directed by order of this Court dated August 15, 1973 are considered and defendants-appellants' application for leave to appeal prior to decision of the Court of Appeals is hereby Granted pursuant to GCR 1963, 852.1.

"Upon review of the records below and briefs of the parties and pursuant to GCR 1963, 852.2(4)(g) and 865.1(7), the judgment of the Oakland County Circuit Court dated August 8, 1973, granting accelerated judgment in favor of defendants and dismissing plaintiffs' complaint with prejudice is affirmed. Opinion to follow.

"It is further Ordered, in view of the limited time which remains under the circumstances disclosed by the record below, that no motion for rehearing or for stay of this order will be entertained by this Court. Final process shall issue forthwith.

"T. E. Brennan and Williams, JJ., not participating."

Our opinion is as follows:

At a special election on December 11, 1972, the voters of the City of Pontiac approved a ballot proposition authorizing the issuance of full faith and credit bonds of the City in principal amount not exceeding $15,950,000 to defray a part of the cost of acquiring a stadium (including site, parking facilities, equipment and other appurtenances) through the agency of the City of Pontiac Stadium Building Authority, for sports, entertainment, recreational and other public purposes.

It was contemplated that the balance of the cost would be provided by the sale of revenue bonds by the Authority.

Thereafter a lease agreement was entered into between the City and the Authority, and a sublease and licensing agreement between the City and the Detroit Lions, Inc. was also entered into. The issuance of the bonds was approved by the Municipal Finance Commission on June 19, 1973. The bonds were advertised and on July 17, 1973 they were sold. They are required to be delivered on August 31, 1973.

It was originally contemplated that the stadium would be built with a dome or roof.

The principal claims asserted in the complaint (filed in the circuit court, Docket No. 73-101,042 on August 1, 1973) concern the decision to defer construction of the

dome or roof; the terms of the lease-agreement between the City and the Authority, and the terms of the agreement between the City and the Detroit Lions.

On March 20, 1973, the lease agreement entered into on that date and the decision to defer the dome or roof were made known to the public. The agreement between the City and the Detroit Lions was entered into and simultaneously announced to the public April 23. Nevertheless, the plaintiffs allowed the balance of the month of April, all of the months of May and June and half of the month of July to pass without commencing any legal proceedings. On July 18, one day after the bonds had been sold following public notice of sale, plaintiffs commenced an original action in the Supreme Court. As an original action of this nature in the Supreme Court is not authorized and without precedent, this Court, on July 31, dismissed the action.

Only then, on August 1, a month before the bonds were required to be delivered, plaintiffs commenced the instant action in the circuit court.

In cases where because of the nature of the subject matter, absolute time limits must be observed, the law requires speedy resort to the courts by those who wish to prevent or modify contemplated transactions or procedures. Cf *O'Brien v. Skinner,* 409 1240 93 S Ct 79; 34 L Ed 2d 211 (1972) per Marshall, J. as Circuit Justice.

Those who would avail themselves of our processes must do so in a manner which facilitates an orderly process of adjudication within the given time frame.

Orderly presentation of the claims here asserted would appear to require an evidentiary hearing. Defendants' counsel are entitled to a reasonable time to prepare for such a hearing, the court a reasonable time to deliberate and reflect upon its decision.

In this case had the plaintiffs in April, rather than inexplicably waiting until August, instituted this action, there would have been adequate time for preparation, presentation and reflection.

The appellate process also requires time for orderly presentation and decision. The ordinary course of appellate adjudication in this state is for cases to be heard first in the Court of Appeals. Normally this Court will consider a case only if it deems further appellate review to be necessary. Plaintiffs' late filing effectively precluded consideration of this case by our intermediate appellate court.

We are of the opinion that in cases of this kind, if the plaintiff fails to resort to the courts without delay (within the context of the time available for adjudication) the courts may refuse to entertain the case. This power is, of course, to be exercised cautiously, circumspectly and only in the kind of unusual situation with which we are now presented. In this case we are satisfied that the circuit judge exercised his responsibility correctely and affirm his order of judgment dismissing the complaint. We express no opinion on the merits of the claims asserted in th complaint filed on August 1.

If we did not grant bypass and enter a final order, plaintiffs would obtain by the mere lapse of time the relief which they have been denied by the circuit judge as the continuation of this litigation would prevent delivery of the bonds.

Judgment Affirmed, without costs, a public question.

Donald B. Swainson
Thomas Giles Kavanagh
Mary S. Coleman
Charles L. Levin
Thomas M. Kavanagh

TRANSCRIPT OF PROCEEDINGS

(Page numbers in parentheses refer to Transcript)

Proceedings had in the above-entitled matter before the Honorable Arthur E. Moore, Circuit Judge for Oakland County, at Pontiac, Michigan, on Wednesday, August 8, 1973.

Appearances: James E. Wells, 13050 Gavel, Detroit, Michigan 48227, appearing on behalf of the Plaintiffs;
City of Pontiac Department of Law, Sherwin M. Birnkrant, Director (By: Alger H. Strom, Deputy City Attorney). Dickinson, Wright, McKean & Cudlip (By: Milton M. Thompson), 800 First National Building, Detroit, Michigan 48226, appearing on behalf of the Defendants.
Court Reporter: F. A. Ryden

(2)

Pontiac, Michigan
Wednesday, August 8, 1973
About 10:30 o'clock a.m.

The Court: The record may show that at my encouragement the parties have submitted findings, the Plaintiffs in the nature of a document entitled "Proposed Findings of Fact and Law," and the Defendants in the nature of a judgment, including findings.

I have examined the Plaintiff's proposed findings and unless there are objections to it, going to page number two, the first nineteen lines seem to me to be factually correct and they are my findings unless I hear objections.

Mr. Strom: We have no objections.
The Court: Very well.

Now going to page two and three, the findings in paragraph four seem to me to be correct. The last six lines of page two and the first six lines of page three, and I think they should be my findings and will be unless I hear objections.

Mr. Strom: I am sorry. Did you say paragraph four?

The Court: Yes, all of paragraph four.

Mr. Strom: All right. And what followed (3) after paragraph four?

The Court: I am just referring to paragraph four. Any objections to paragraph four?

Mr. Strom: We have no objection to paragraph four.

The Court: Then if you refer to page number three, to paragraph number fourteen, I think it is correct and should be my findings and will be unless you have objection.

Mr. Strom: We have no objection to that, your Honor.

The Court: All right. Now may we hear from you, please.

Mr. Strom: Paragraph fourteen on page three, your Honor.

The Court: Yes, paragraph fourteen.

Mr. Strom: We have agreed and we have submitted a document which would indicate that at the time of this suit that there is no construction contract that would provide for the actual installation of the cover to the roof.

However, we have also submitted with affidavits, and as an exhibit, that there is construction that is under contract at this time for a substantial portion of (4) roof installation.

The Court: I understand your position and from that standpoint I think I will give an appropriate finding that covers what he urges appropriately and your position as well.

Mr. Strom: All right. In addition, however, the statement that none of these arrangements were made known to the voters at the time of the election, I object.

The Court: Yes. I do not think that is appropriate, but I will give an appropriate instruction.

Now, if there is nothing further, I will give my findings of fact and conclusions of law and determination and decision in the case as follows:

First of all, may I say that all exhibits which have been offered by either party are admitted into evidence, as this was necessary for the appropriate record in this case.

Secondly, may I say that I do not find any dispute or issue of fact left for trial, for the decision which is to be made on this motion before the Court disposes of the entire case properly.

This is the third of three actions brought relative to the so-called stadium issue of the City of Pontiac. The bond issue in question was approved (5) by the city electors on December 11, 1972. The ordinances, resolutions, and proposals of the city and Stadium Authority did not specify that a roofed stadium would be built but proponents of the project did so advertise. Further, the claims and specifications which have been mentioned and described would require both the architect and the construction company to provide for the footing for a stadium room. However, the roof has been eliminated at this time for lack of funds and is not contemplated. as I understand it. Thus the project now requires the same 80,000 seating capacity substantially and requires substantially the same contract with the Detroit Lions football team to play all of its home games in the stadium for the next 30 years.

The issue involved in this matter as presented by the respective clients is therefore whether the inability to roof

the stadium now at the present time deleted from the project at the present time because of lack of funds, whether this chance vitiates the approval of the bond election or that vitiates the approval of the bond issue which had the approval of the Michigan Municipal Finance Commission.

Exhibit Eight in this cause entitled "Analysis of Potential Community Impact of the Proposed Pontiac Stadium," dated July 19, 1972, is a little more than a year old. It was prepared by a specialist known as (6) Touche-Ross and Company.

Plaintiff's Exhibit Three is a newspaper advertisement appearing in the Oakland Press, a Pontiac newspaper dated December 5, 1972, and entitled in capital letters, "Stadium Progress Report."

The election in question as has been indicated was held on December 11, 1972, and the bonds in question insofar as general obligation, are those approved by the electors on that election date.

Action was filed by the same Plaintiffs or substantially the same plaintiffs in this Court in cause 73-95345, involving the same bond election, and it was adversely decided against the suit by the Plaintiff and the finality of that decision is not to be questioned for no appeal was taken from it. It was in the nature of a class action suit on behalf of all residents or tax payers of the Plaintiffs. And being in that nature and clearly determinative of the matters contained, it is binding upon the Plaintiffs and the parties similarly situated in the nature of a class action suit. To the extent that it is controlling in that respect, the matter is *res adjudicata.*

The second action by these plaintiffs was a matter in the state supreme court, cause number 101042, or 55122,

I don't know which, and sought relief by a direct (7) application to the Supreme Court. That matter was concluded on the 31st day of July, 1973, by an order of the Supreme Court which reads as follows and I quote,

> "On order of the Court, the 'complaint' filed by the plaintiffs is considered, and is hereby dismissed for failure to comply with the applicable court rules concerning appelate procedure in this Court. GCR 1963, 851.3, 852, 853. Defendants' motions for judgment, and for alternative relief are hereby denied as moot."

The document which I have is a copy of the court decision, it is certified by the Clerk of the Supreme Court on the first day of August of this year.

The action at bar was shortly filed by the Plaintiffs who are substantially the same plaintiffs as those involved in the two previous matters, and I will refer to the action at bar as the third action.

The matter comes before this Court on a motion for Summary and Accelerated Judgment. In this motion the Defendants, the moving party, City of Pontiac, and City of Pontiac Stadium Building Authority, have brought the present motion asserting, first, that the Complaint filed in this cause fails to state any claim upon which relief can be granted or to raise any general issue of material fact for the following (8) reasons:

a. The Complaint states no legally cognizable reason why the bonds in question are illegal or otherwise invalid;

b. As can be seen the Plaintiffs' Exhibit "A" (specifically pages 37 thru 40), the bonds in question are being issued pursuant to and in accordance with Michigan law

and the guidelines set by the Michigan Supreme Court in the case of *Alan vs. Wayne County,* 388 Mich 210, a case which I have mentioned previously. The Plaintiff in brief contends to the contrary and these are the matters before the Court therefore accordingly.

After the case of *Alan vs. Wayne County,* 388 Mich 210, and to some degree in pursuance of that decision and because of that decision, the record shows that the Defendants, City of Pontiac and the Pontiac Stadium Authority, deemed it necessary to revise and reconstruct the financing of the stadium so that any bonds issued by the Authority under Acts 31 and 94, would be supported not by the pledge of full faith and credit of the city for the making of its rental payments, but only by a pledge of the revenues derived from the operations of the stadium. The obvious reason is that the decision in the *Alan* case, made it clear that the so-called Authority might properly issue revenue bonds (9) even though they were payable from rental to be paid by the City, provided that the obligation to pay such rental was limited to the Stadium operation revenue or revenues. This is quite apparent from page 311 of the Supreme Court opinion.

There the Supreme Court said the municipality must for a true rent situation be the actual user of the public improvement except where it acts merely as a conduit, and the actual users, such as the Tigers here, pay the rent. This was the end of the quote. This was the language in the *Alan* case.

Going back to the bond issue election, there appears to be nothing in the prerequisite to the election which required official action which designated whether the stadium in question was to be a covered stadium or not. There is evidence as has been shown by exhibits that a covered

stadium was contemplated originally and the Defendants in this cause do not dispute that.

The ordinance that was submitted to the electors and the voting proposition upon which they cast their votes and the proposition which was carried, recited as follows, and I quote:

> "Shall Ordinance number 1649 of the ordinances of the City of Pontiac, Michigan, be adopted and the full faith and credit bonds of the (10) City be issued in principal amount not exceeding $15,950,000.00 as therein provided, which ordinance authorizes the borrowing of not to exceed that amount and the issuance of such bonds to defray a part of the cost of acquiring a stadium, including site, parking facility, equipment and other appurtenances, either directly or through the agency of the City of Pontiac Building Authority, for sports, entertainment, recreational and other public purposes?"

The record shows that the City of Pontiac adopted the proceedings for the issuance of bonds at set forth there in the offiical prospectus which was attached as Exhibit A to the Plaintiffs' Complaint. The record shows that the issuance of these bonds was approved by the Municipal Finance Commission on June 19, 1973.

The record shows the official notice of sale was published on July 3, 1973.

The record shows that the bonds were sold on July 17, 1973, along with $25,000,000.00 stadium revenue bonds, to a syndicate involved. The bonds were described more particularly on pages one, two, and three of the official prospectus. They contain the usual full faith and credit paragraph and this was as voted by the electors and was made

payable from taxes which may be levied without (11) limitation as to rate or amount. All this as is in ordinary matters of full faith and credit bonds. These matters of full faith and credit have nothing to do with Acts 31 and 94 which I have mentioned.

The record shows that the revenue bonds were approved by the Municipal Finance Commission on June 19, 1973. The official notice of sale was published on July 3, 1973, and the bonds were actually sold on July 17, 1973. to the same syndicate which purchased the General Obligation Bonds. These revenue bonds are described on pages 22 and 23 and 24 of the prospectus.

It is the contention of the Defendants that construction bids were taken some time ago at advantageous prices, but that these bids expire on August 11, 1973. It is the contention of the Defendants that in reliance on these bids, the construction manager for the Stadium Project has entered into a contract with the Authority by which he guarantees that the direct construction costs will not exceed $29,300,000.00 this as shown on pages 42 and 43 of the prospectus.

And the Defendants contend that this guarantee is conditioned upon acceptance of the construction bids no later than August 11, 1973.

It is therefore the contention of the Defendant that if the bonds cannot be delivered and the (12) proceeds received prior to that date, the bids will be lost thus jeopardizing the project. If these dates are considered in relation to today, which is August 8, 1973, it would be quite apparent that time is of the essence in this matter and for that reason, I gave this lawsuit preference over other actions.

It is to be noted that the second suit, or action, filed in the Supreme Court on July 18, by the Plaintiffs in this cause, was filed one day after the bonds were sold which was, however, some four months after the first suit brought by the Plaintiffs was dismissed and had not been appealed.

During the interim, the Plaintiff did nothing further about the bond issue and it is contended, however, that the City proceeded with expenditure of funds and made financial studies, architectural plans, nad did other things essential to the ultimate progress of the project and the sale of the bonds.

On March 20, 1973, a lease agreement was executed and a bond authorization proceedings were adopted on March 20, 1973. It is quite apparent that the restructuring of the stadium financing was required by the *Alan* decision in that a new lease agreement was negotiated. There appears to have been in existence a preliminary contract with the (13) Detroit Lions Football team, but it provided by its terms for implementation through later adoption of a final or definitive agreement. This agreement, as I have indicated, was subsequently adopted and accomplished.

The allegations in the Plaintiffs' Bill of Complaint charge that the electors voted for a domed stadium, whereas construction of the dome is not now included in the present plan, and that this vitiates the election and the project insofar as the issuance of bonds are concerned. This Court finds, however, and determines that what the people voted for was the pledging of full faith and credit of the city for a $15,950,000.00 general obligation bond issue to defray a part of the cost of a stadium. The official procedure shows they did not vote specifically for a domed stadium or for that matter for an undomed stadium, but that they did vote for an 80,000,—but they did contem-

plate that there would be constructed an 80,000-seat stadium or thereabouts in conformity with the preliminary proposal. It is quite common knowledge that the cost of construction of almost any building project in these days is rising because of inflationary factors. Delay in this regard adds to the inflation as is a well known fact of which the Court takes judicial notice.

It is important to note that the dome (14) of the stadium has not been abandoned, but on the contrary, the footings of the dome are included in the plans and specifications, and it is the contention of the Defendants that when more funds are available, the dome may then be provided.

I find and determine as a matter of obvious knowledge that many units of government have on various occasions voted bond issues only to find subsequently that some modification of the plan was required to keep costs within available funds. Thus, as I indicated, during trial, school bonds may be issued to pay for the costs of a new school building and yet it may be ascertained subsequently that such items as a swimming pool have to be discarded permanently or temporarily because insufficient funds are available. There has to be discretion in the modification of a proposal within a reasonable extent, otherwise technicalities might prevent any and all bond issues.

So far as matters raised in the previous decision before this Court are concerned, they have become *res adjudicata* or finally concluded by the prior determinations to the extent that they were not considered by the Court and I make no findings in that regard. Plaintiffs urge as is Plaintiffs' right, particularly under certain paragraphs of the Complaint, that a fraud was incurred against the tax payers of the city of Pontiac in the proposal at that stage

to build (15) a stadium with the proceeds of the bond issue which does not include a covered roof at this time. Thus Plaintiffs' issue raised in that fashion requires this Court to determine whether or not the taxpayers were defrauded actually or constructively by the changes of the stadium project to an uncovered amphitheater, following March 13, 1973, after the vote on the general bond issue of December 11, 1972.

During the trial I asked respective counsel to furnish me with authorities contended applicable hereto and this issue so involved is therefore whether the inability to roof the stadium now, at the present, yet continue with it in its partially incompleted stage of footings only because of lack of funds vitiates the approval of the bond issue election or vitiates the approval of the bond issue by the Municipal Finance Committee.

Counsels for the Plaintiff rely upon *McQuillan,* 3rd edition, Vol. 15, page 276, and the case of *Thayer versus Muskegon,* 152 Mich. 59. Counsel also recites general law foundin 64 C.J.S. 536, and I do not believe that the authority of *Thayer* or *MacQuillan* is directly in point but I do believe that the recital from *64 Corpus Juris Secundum 536,* is a true general statement of the law in this regard. The People must have sufficiently definite information to reasonable apprize them, the voters, of the general nature (16) and scope of the improvement contemplated.

In the case of *Sykea versus Balk,* 179 S.B. S.E. (2), 439, a civic center voter bond project was contemplated, and the voters were told in the procedure for the election where the site for this civic center would be located. After the action was approved, the officials found that in their judgment the site selected would be unsuitable, giving as a reason traffic flow problems. The Court there said in

most jurisdictions which permit the use of such bond and general referendum in determining whether there have been misrepresentations such as to void the bond election, the courts have consistently looked to the notice of election ballot and the ordinance authorizing the issuance of the bond. In matters which official proceedings, by which official proceedings are constituted, as a legal prerequisite, this Court says again this Court will not interfere with the exercise of discretionary powers of the muni cipal corporations unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion.

In the case of *Mills versus San Francisco Bay Area Transit System,* 261 Cal. App. 2nd, 666, the transit district had decided after election to change the location of the station involved in the transit system to a distant point of one and one and a half miles distant therefrom. The court (17) sustained the right of the district option of modification.

In the case of *Detroit United Railway versus City of Detroit,* 255 U.S. 171, the United States Supreme Court decision, that court upheld the dismissal of a contesting suit by saying this, quote:

> "We think the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people, conformed to the requirements of law."

Of like effect is the case of *Coggins versus Ashville,* 180 S.E. (2), 149, which holds,

> "The deviation from the general purposes for which bonds are authorized, do not outlaw such changes as

are necessary under existing conditions to accomplish the general purpose."

In the case of *Kreig versus Springfield,* 106 N.E. (2), 652, bonds were issued to pay for two separate street improvements. These were general obligation, city-wide bonds, to be covered by one bond issue. The proceeds proved to be insufficient for both projects. The court permitted (18) them to proceed by deleting one, at least for the time being, and saying as follows:

"It lies within the sound discretion of the legislative body of the City of Springfield to decide whether to proceed with one of the projects even though there will be insufficient funds to proceed with the other project."

In large effect is the case of *Missouri Power and Light Company versus Pattonsburg,* 125 S.W. (2d) 20, where the size of the project had to be reduced because of lack of funds.

It is my finding and determination in view of these authorities that no fraud, either constructive or otherwise, may be included to the actions involved, and that the change in plans are reasonable under the circumstances involved, and lie entirely within the discretion of the Defendants.

It may be that these matters are included by the first lawsuit which I have previously mentioned as being *res adjudicata,* but I believe that my determination is more appropriate, even though the matter may be *res adjudicata* on closer analysis. The same reasoning applies to the question of laches and estoppel.

This being a class action suit in its (19) purpose, the determination of this Court will be binding upon all par-

ties of like position and concern. There has to be a point in litigation where people may be subsequently free to exercise whatever their rights may be.

A summary judgment may be entered in this cause in favor of the Defendants, and I have examined the proposal which they submit and I will sign it at this point.

The opinion of the Court which I recited on the record may be written at the request of either party and be filed in the cause.

Is there anything further from either party?

Mr. Wells: Your Honor, I would note that the judgment that has been offered does vary from the terms of your Honor's opinion. I would ask that a new judgment be drawn in accordance with your Honor's opinion, specifically with regard to the findings of laches and *res adjudicata*. That would be on page five and subsequent pages.

The Court: Well, I think what I said in my opinion indicates the extent to which that applies and I don't believe it is necessary to amend the judgment.

Mr. Wells: I would note the Court does not speak through its oral statements in Court as much as it (20) does in its judgment. This is at variance. I think it should be adopted to your opinion so it reflects everything that your Honor had said.

The Court: Well, there isn't any question that there is finality, *res adjudicata*, and an element of delay in certain respects, and I have so found, except as to the issue which I have determined more fully. This is clear, I believe.

Mr. Strom: Thank you, your Honor.

Mr. Thompson: Thank you, your Honor.

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CERTIFICATION OF COURT REPORTER

State of Michigan
County of Oakland—ss.

I hereby certify that the above and foregoing transcript is a true and correct transcript of Excerpt of Proceedings had in the above-entitled matter at the above time and place, taken stenographically by me at Pontiac, Michigan.

/s/ LaBon A. Ryden,
Official Court Reporter
Sixth Judicial Circuit
Oakland County, Michigan